STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of PMB, Minor.

UNPUBLISHED
March 25, 2014

No. 318317
St. Clair Circuit Court
Family Division
LC No. 13-000141-AY

Before: BECKERING, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Respondent appeals as of right from a circuit court order terminating his parental rights to the minor child under the Adoption Code, MCL 710.51(6). We affirm.

Respondent and petitioner-mother were married in 2000 and had one child together. Respondent and petitioner-mother divorced in 2003, and petitioner-mother was granted sole physical and legal custody of the minor child. In 2005, petitioner-mother remarried, and in July 2013, she and her husband filed a petition to terminate respondent's parental rights for purposes of stepparent adoption. The trial court held a hearing on the petition on September 6, 2013. Following the testimony of several witnesses, the trial court terminated respondent's parental rights pursuant to MCL 710.51(6).

Termination under MCL 710.51(6) provides as follows:

> If the parents of a child are divorced . . . and if the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur:
>
> (a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition.

(b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition.

The petitioners in an adoption proceeding must prove both subsections (a) and (b) by clear and convincing evidence before termination can be ordered. *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001); *In re Hill*, 221 Mich App 683, 691; 562 NW2d 254 (1997).

In this case, respondent does not challenge the trial court's findings under MCL 710.51(6). Instead, he argues that the trial court erred by declining to consider the child's best interests, pursuant to MCL 712A.19b(5), before terminating his parental rights. Respondent's reliance on MCL 712A.19b(5) is misplaced. That provision is part of the Juvenile Code, MCL 712A.1 *et seq*. When involuntary termination of parental rights is sought under the Juvenile Code, MCL 712A.19b(5) requires the court to consider the child's best interests. In this case, petitioners sought termination of respondent's parental rights under the Adoption Code, MCL 710.51(6). The court is not obligated to consider the child's best interests before terminating parental rights under the Adoption Code, *In re Hill*, 221 Mich App at 696, although it is required to consider the child's best interests before approving the child's adoption, MCL 710.51(1)(b); MCL 710.22(g). Nevertheless, because termination is permissive under MCL 710.51(6), this Court has held that the trial court is not prohibited from considering evidence relating to the child's best interests when ruling on a petition filed pursuant to MCL 710.51(6). *In re Hill*, 221 Mich App at 696. "Thus, even if the petitioner proves the enumerated circumstances that allow for termination, a court need not grant termination if it finds that it would not be in the best interests of the child."[1] *In re Newton*, 238 Mich App 486, 494; 606 NW2d 34 (1999).

Because a trial court may consider the child's best interests when deciding whether to terminate parental rights pursuant to MCL 710.51(6), the trial court erred when it precluded respondent from arguing that termination was not in the child's best interests. However, because the evidence disclosed that respondent had not maintained any type of significant relationship with the child for at least two years preceding the filing of the petition despite having the ability to visit or contact the child, and that he only sought to renew their relationship after the petition was filed, the evidence did not support a finding that termination was not in the child's best interests. Therefore, we conclude that the error was harmless. MCR 2.613(A); MCR 3.800(A).

[1] Respondent's reliance on the best interest factors in the Child Custody Act, MCL 722.23, is also misplaced. Those factors are used to resolve a custody dispute between two competing parties, and the trial court is not required to consider those factors in termination proceedings. See *In re JS & SM*, 231 Mich App 92, 99-101; 585 NW2d 326 (1998), overruled in part on other grounds *In re Trejo Minors*, 462 Mich 341, 353; 612 NW2d 407 (2000); *In re Schejbal*, 131 Mich App 833, 835; 346 NW2d 597 (1984), and *In re Atkins*, 112 Mich App 528, 540-541; 316 NW2d 477 (1982).

Respondent next argues that an error in the service of process requires reversal. Specifically, respondent claims error under MCR 2.105, because he was served by certified mail, but he did not personally sign the return receipt, his current wife did. Respondent failed to preserve this issue by raising it in the trial court. See *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Because the issue is unpreserved, "review is limited to determining whether a plain error occurred that affected substantial rights." *In re Egbert R Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007).

In general civil actions, service of process is governed by MCR 2.105. In pertinent part, MCR 2.105(A)(2) provides that service may be made by certified mail, and that "[s]ervice is made when the defendant acknowledges receipt of the mail." The rules applicable to general civil actions are applicable to proceedings under the Adoption Code unless otherwise provided. MCR 3.800(A). When a petitioner seeks to terminate the rights of a noncustodial parent under the Adoption Code, MCR 3.802(A)(2) provides that the petition "must be served on the individual . . . in the manner provided in MCR 5.105(B)(1)(a) or (b)." MCR 5.105(B)(1)(b)(*iii*) permits service to be made on a person other than an attorney by certified mail. "[S]ervice is not made for purposes of this subrule until the individual receives the paper." MCR 5.105(B)(1)(b)(*iii*). Here, although respondent did not sign for the certified mail, he admitted that he received it because he requested court-appointed counsel for assistance in opposing the petition, later retained counsel, and personally appeared for the hearing. Therefore, respondent has not shown a plain error.

Respondent lastly argues that reversal is required because the minor child was not provided with notice of the hearing, contrary to MCL 712A.19b(2). This issue is also unpreserved because it was not raised in the trial court and thus, "review is limited to determining whether a plain error occurred that affected substantial rights." *In re Egbert R Smith Trust*, 274 Mich App at 285.

Again, respondent's reliance on MCL 712A.19b(2) is misplaced because that provision is part of the Juvenile Code, whereas this case involved a proceeding under the Adoption Code. Under MCL 712A.19b(1) of the Juvenile Code, the trial court may terminate the rights of a parent to a child who is in foster care under the temporary custody of the court or in the custody of a guardian. Under the Juvenile Code, written notice of the termination hearing is required to be served on various interested persons, including the child if she "is 11 years of age or older[.]" MCL 712A.19b(2)(h). Those provisions are not applicable in the case at bar. Here, the child resided with petitioners, and termination of respondent's parental rights was sought and ordered under MCL 710.51(6) of the Adoption Code. In a proceeding to terminate the parental rights of a noncustodial parent under the Adoption Code, the interested parties include the petitioner and "the adoptee, if over 14 years of age[.]" MCR 3.800(3)(a)-(b). An adoptee of the requisite age is required to consent to his or her adoption, MCL 710.43(2), and is entitled to notice of an adoption petition. MCL 710.45(5). However, nothing in the plain language of the applicable statutes or court rules requires notice of the termination petition to anyone other than "the individual" who is the subject of the termination petition, MCR 3.802(A)(2), and there is no statute or court rule requiring notice of a hearing on a termination petition sought under MCL 710.51(6) to be served on a child as an interested person. Moreover, even assuming that such a requirement can be read into MCL 710.51(6) and MCR 3.800(B)(3), the child in this case was

not an interested person under MCR 3.800(B)(3) because she was under the age of 14 when the petition was filed. Therefore, respondent has not shown a plain error.

Affirmed.

/s/ Jane M. Beckering
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan